Supreme Court of the United States

October Term, 1977

No. 77-258

ARNOLD R. JAGO, Superintendent,
Petitioner,

vs.

TIMOTHY PAPP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JOSEPH R. GRUNDA,
Lorain County Prosecutor

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OPINIONS BELOW

The opinion of the Court of Appeals of Lorain County, Ohio, Case No. 2180, is unreported (Appendix B, page A7). The opinion of the Ohio Supreme Court, Case No. 74-778, is unreported (Appendix C, page A16). The opinion and memorandum of the United States District Court For The Southern District of Ohio, Western Division, Case No. C-1-75-301, are unreported (Appendices D and F, pages A17 and A19). The orders of the United States Court of Appeals For The Sixth Circuit, Case No. 76-1402, remanding to the District Court for Supplementation and Affirming the Judgment with Modification, are not reported (Appendices E and G, pages A31 and A36).

JURISDICTIONAL BASIS

The decision of the United States Court of Appeals for the Sixth Circuit was entered March 8, 1977 (Appendix D, page A17). After remand to the District Court, the decision was entered by the Court of Appeals on June 14, 1977 (Appendix G, page A36). Jurisdiction is conferred by U.S.C., Section 1254 (1). A Stay of the Mandate of the Court of Appeals was granted July 11, 1977 (Appendix H, page A38). An extension of the Motion to Extend Order Staying Mandate was granted by the Court of Appeals on August 8, 1977, to August 24, 1977.

QUESTION PRESENTED

I. Whether the Doctrine of Stone v. Powell, ____ U.S. ____, 96 S. Ct. 3037 (1976), Limiting Habeas Corpus Review in the Fourth Amendment Context Should Be Extended to Limit Federal Habeas Corpus Review of Fifth and Sixth Amendment Claims, Where, Under the Facts of This Case, There Was an Opportunity for Full and Fair Hearing of All Claims in the State Courts.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution:

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising

in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Timothy Papp, hereinafter Respondent, was indicted by the October 1973 Term of the Lorain County, Ohio, Grand Jury for the crimes of first degree murder, murder in the perpetration of a rape, rape of a female under the age of twelve, and sodomy in violation of criminal sections of the Ohio Revised Code (TR 6, 7, 8).

The case was tried in the Court of Common Pleas of Lorain County, Ohio, Case No. 16862, to a jury which returned guilty verdicts to all the charges except sodomy which was dismissed by the trial court. Accordingly, the trial court sentenced respondent to three concurrent terms of life imprisonment (Appendix A, page A1).

On pre-trial motion to suppress and on appeal, respondent raised the allegations which form the basis of his subsequent petition for habeas corpus. These issues were considered by both the state trial court and appeals court. The trial court judge, after a full evidentiary hearing (MR 3-104), issued an order denying the Motion to Suppress (See Appendix B, page A8), and the appeal court after a full consideration of the record issued a unanimous opinion affirming the judgment of the trial court (Appendix B, page A7).

An appeal to the Supreme Court of Ohio was dismissed on November 22, 1974, for lack of a substantial constitutional question (Appendix C, page A16).

On August 14, 1975, respondent filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Ohio, Western Division. On February 26, 1976, the District Court entered judgment granting respondent's petition for writ of habeas corpus (Appendix D, page A17).

Petitioner on March 4, 1976, filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit.

On April 6, 1976, petitioner filed an appeal with the United States Court of Appeals for the Sixth Circuit. On March 8, 1977, the Circuit Court remanded the case to the District Court to supplement the record with tape recordings of respondent and to certify to the Circuit Court any grounds then existing for the District Court's reconsideration of its opinion.

On May 6, 1977, the District Court supplemented the record and certified that the tape recordings did not alter its prior opinion. The district judge did note that he

would, if he had had the authority, amend his judgment in light of footnote 12 of *Brewer v. Williams*, ... U.S. ....., 97 S. Ct. 1232 (1977) at 1243 (Appendix F, page A35).

On June 14, 1977, the Sixth Circuit Court of Appeals affirmed the determination of the District Court that the March 23, 1973 interrogation of respondent, Papp, violated his constitutional rights as set forth in the opinion of the District Court filed therein on February 19, 1976, and accordingly remanded the cause to the District Court to modify its judgment as to the admission of evidence considered in the light of *Brewer v. Williams, supra,* and to grant respondent Papp's petition for writ of habeas corpus unless retried by the State within a reasonable time (Appendix G, page 36).

On July 5, 1977, a petition for stay of the mandate was filed with the Sixth Circuit Court of Appeals, and on July 11, 1977, the mandate of the Court of Appeals was stayed pending the application for certiorari (Appendix H, page 38).

STATEMENT OF FACTS

On March 12, 1973, Roxie Ann Keathley, age nine, disappeared while collecting pop bottles in her neighborhood in Lorain, Ohio (TR 83-89, 106). Respondent, Timothy Papp, resided in the same neighborhood and was seen with Roxie Ann shortly before her disappearance (TR 31). On March 13, 1973, in connection with their investigation of the disappearance of the little girl, the police transported the respondent to the Lorain County Sheriff's Office around 11:30 p.m. (TR 337). There Papp was questioned by Detective Zieba, in the presence of Detectives Mahoney and Penrod (TR 337). Prior to the

questioning, Papp was advised of his constitutional rights as required by the Supreme Court in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966) (TR 338). At that time, Detective Zieba questioned respondent about a trunk (TR 338). The respondent stated that he transported the trunk to his mother's on the morning of March 13, 1973, but when his mother would not answer the door, he dumped the trunk behind a nearby grocery store (TR 340). At the conclusion of the interrogation, the respondent took the detectives to the rear of the grocery store, but no trunk was found (TR 341-342). The respondent expressed no knowledge concerning the disappearance of the girl (TR 340-341). It was in the course of this interrogation that he indicated that he had contacted an attorney (MR 82), but there is no indication that he desired the attorney's presence. At the end of the approximately two hour period, he was returned home by the deputies with the advice that he contact an attorney and inform him of the interrogation (TR 341; MR 91).

Throughout the next week, in their continuing investigations, the deputies had several more brief encounters with respondent who was continually asked concerning any knowledge he might have of the girl's disappearance (TR 342; MR 78-79). The meetings with the officers of the Sheriff's Department were voluntarily initiated by the respondent (TR 342). He, in fact, waited at the apartment complex where he and the Keathleys lived so he could talk to the detectives (TR 342).

It was during the course of these encounters that respondent agreed to take a lie detector test on the evening of March 21, 1973, and arrangements were made to administer the test at his home (MR 98). At this time the respondent was not the only suspect (MR 98).

On March 21, 1973, Papp was arrested for threatening his mother-in-law on a warrant signed by his mother-in-law, and placed in county jail (TR 79). Late that same afternoon, respondent requested to speak with Detective Zieba regarding the location of his wife and child (MR 60). Zieba, in the presence of Detectives Mahoney, Bulger, and Penrod, carried on a conversation which eventually centered on the disappearance of Roxie Ann Keathley, who had now been missing for just over one week. No *Miranda* warnings were given at this conversation nor was an attorney for the respondent present (MR 59, 65).

Respondent, during the course of the conversation, asked Detective Zieba for some whiskey as he had difficulty sleeping and was told he could not have whiskey. He was given a small cup of wine, which he accepted (TR 353-354). Respondent continued his denial of any relevant information concerning the child's disappearance and was returned to his cell (TR 354).

On March 22, 1973, respondent was transported to the municipal court on the unrelated charge (MR 101). The judge of the municipal court advised respondent of his right to counsel, and that if he could not afford counsel, one would be appointed (MR 102). Respondent waived the right to counsel (MR 102), pleaded no contest to the charge and was sentenced to ten days in the county jail.

On March 23, 1973, while in custody the respondent requested to see Detective Zieba. Detective Zieba conversed first about the respondent's wife and child. Eventually the conversation shifted to the disappearance of Roxie Ann Keathley (TR 344). No *Miranda* warnings were given the respondent at the start of the conversation regarding the missing girl and the respondent's trunk (MR 65). The entire conversation was taped by the Sheriff's

detectives (MR 100, 103). On two occasions, the respondent requested an attorney, was told of his options by the detectives, and the respondent responded in a negative manner to his options before questioning resumed (MR 67, 69, 82, 90; TR 383, 384). At the time of the conversation, Papp had taken medication for his nerves prescribed by a physician (MR 71-72).

As on the 21st, Papp was given some wine (TR 354). Prior to consuming the wine, Papp broke down and stated he "didn't mean to hurt the little girl." (TR 347). Papp offered to draw a diagram of the location of the body and lead them there (TR 348). The diagram was made, but the detectives declined to allow the respondent to accompany them to the scene (TR 347). After an unsuccessful search, the detectives returned to respondent's cell and inquired as to whether he was still willing to lead them to the body (TR 350). The respondent agreed and voluntarily, without requesting the assistance of counsel, led the deputies to the child's body (TR 350).

The trunk was found on March 26, 1973 (MR 84). The respondent, after being arraigned in the Court for murder and having counsel appointed, requested to see Detective Zieba. Zieba after giving the respondent a *Miranda* warning, the respondent, without reservation or request for counsel, drew a diagram of the location of the trunk and at the same time denied knowledge of the death of the girl (TR 357).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. WHETHER THE DOCTRINE OF STONE v. POWELL, ... U.S. ....., 96 S. Ct. 3037 (1976), LIMITING HABEAS CORPUS REVIEW IN THE FOURTH AMENDMENT CONTEXT SHOULD BE EXTENDED TO LIMIT FEDERAL HABEAS CORPUS REVIEW OF FIFTH AND SIXTH AMENDMENT CLAIMS, WHERE, UNDER THE FACTS OF THIS CASE, THERE WAS AN OPPORTUNITY FOR FULL AND FAIR HEARING OF ALL CLAIMS IN THE STATE COURTS.

The Petitioner would submit that habeas corpus relief of Fifth and Sixth Amendment claims of state prisoners should be restricted to the requirements of *Stone v. Powell*, ... U.S. ....., 96 S. Ct. 3037 (1976). This Court held in *Stone v. Powell, supra,* that where the state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim a state prisoner may not be granted habeas corpus relief in the federal system on the grounds that evidence which was obtained in an unconstitutional search and seizure was introduced at trial. Justice Powell, in his concurring opinion in *Brewer v. Williams,* ..... U.S. ....., 97 S. Ct. 1232 at 1247 (1977) raised the question whether the rationale of *Stone v. Powell, supra,* should be applied to "those Fifth and Sixth Amendment claims or classes of claims that more closely parallel claims under the Fourth Amendment."

The Court noted in *Brewer v. Williams, supra* at 1247 per Powell, Jr. concurring, that in contrast to Fifth and Sixth Amendment claims, Fourth Amendment claims uniformly involve evidence that is "typically reliable and often the most probative information bearing on the guilt

or innocence of the defendant." See also *Stone v. Powell, supra* at 3050. The facts in this case parallel the type of evidence traditionally suppressed in a Fourth Amendment context.

As in *Brewer v. Williams, supra,* the evidence of how the child's body was found is of unquestionable reliability and its probative value is certain. The respondent not only drew a diagram of where the body was (TR 347), but after the Sheriff's Department was unable to find the body, the respondent led the deputies to the location where the body was recovered (TR 350). The costs in excluding such evidence are apparent. Not only is the truthfinding process deflected, but in many instances the guilty are set free. See, *Stone v. Powell, supra.*

The Supreme Court recognized that there was "no additional contribution, if any, of the consideration of Fourth Amendment claims in collateral review." *Stone v. Powell, supra* at 3051. The same rationale applies in a Fourth, Fifth, or Sixth Amendment context. There is no more reason to believe that the "educative effect" of granting a state prisoner a federal habeas corpus review in a Fifth or Sixth Amendment claim would be any different than a claim raised under the Fourth Amendment. Nor is the risk and subsequent deterrent effect of a state conviction which had been affirmed on direct review being overturned in a federal habeas proceeding any greater under the Fourth, Fifth, or Sixth Amendment. As this Court noted in *Stone v. Powell, supra* at 3051 any possible deterrence of Fourth Amendment violations is based upon the dubious assumption that law enforcement authorities would fear that federal habeas corpus review might reveal flaws that weren't revealed at trial or on appeal in the state system. This assumption has no more validity in the context of the Fifth and Sixth Amendment. Nor could it

be argued that the Lorain County Sheriff's Office attempted to conceal the nature of the interrogation with the Respondent when, in fact, the entire March 23, 1973 conversation was recorded and submitted to the State Court for review.

Whether it is in the context of furthering Fourth, Fifth, or Sixth Amendment rights the goal of furthering such rights is far outweighed by other values vital to a rational system of criminal justice. *Stone v. Powell, supra.* This is particularly true where the reliability of the evidence is beyond question.

The Petitioner recognizes that if Fifth and Sixth Amendment claims cannot be invoked on federal habeas corpus review, the state court must have provided the respondent with a full and fair hearing of his claims. The Supreme Court in *Stone v. Powell, supra,* at 3052 would not allow federal habeas corpus on Fourth Amendment claims where the "State had provided an opportunity for a full and fair hearing," but the Court did not define the term "opportunity for full and fair hearing."

The Court's reference to *Townsend v. Sain,* 372 U.S. 293 (1963) in n. 36 provides some guidance in this determination. The *Townsend* decision held that a federal court must grant an evidentiary hearing to a habeas applicant seeking to obtain release from a state court conviction when the applicant did not receive a full and fair evidentiary hearing in a state court. The court then went on to set out criteria to be used by the federal court in determination of when an evidentiary hearing would be granted.

At least one court in defining the term "opportunity for full and fair hearing" for purposes of *Stone v. Powell, supra,* has found that where there are facts in dispute, full and fair consideration requires consideration by the fact-finding court and at least the availability of meaningful

appellate review by a higher state court. Where, however, the facts are undisputed, and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate court, presented with an undisputed factual record, gives full consideration to defendant's constitutional claims. *O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977).

Here, whether the standard to be applied is that of *Townsend v. Sain, supra*, or whether the test for purposes of a habeas corpus are to be further defined by the Court, the State has afforded respondent with a full and fair litigation of his federal claims at both the trial level and appellate level of the state court.

Respondent was afforded a full evidentiary hearing at his pretrial motion to suppress (MR 3-104). The Appellate Court heard arguments upon the record of the trial court, including the transcript of the proceedings; and the briefs, and oral argument by counsel for the parties. The Court reviewed each assignment of error and made finding of fact and law (Appendix B, page A7). There was no new evidence offered by respondent and all material facts were developed at the state court hearing (MR 3-104). Thus, the Respondent's Fifth, See *Miranda v. Arizona*, 384 U.S. 436 (1966), and Sixth Amendment, See *Escobedo v. Illinois*, 378 U.S. 478 (1964), rights and the question of the voluntariness of any waiver of counsel, See *Frazier v. Cupp*, 394 U.S. 731, and the voluntariness of any subsequent statements, See *Schneckloth v. Bustamonte*, 412 U.S. 218 at 227 (1973) were fully and fairly determined by two tiers of State Courts. These questions should not have been then again subject to collateral review in the federal system in light of the competence of the State system to deal with those issues; See footnote 35, *Stone v. Powell*, *supra* at 3341.

Denying federal habeas corpus on a Fifth or Sixth Amendment claim does not pose any danger to the reliability of the fact-finding process and would foster public respect for the ability of the law and the administration of justice to determine ultimate guilt or innocence. Thus, in view of the minimal contribution and substantial societal costs to the effectuation of the Fifth and Sixth Amendment, a state prisoner who has had a full and fair hearing in the state courts, should not be granted federal habeas corpus relief on Fifth and Sixth Amendment grounds.

CONCLUSION

The doctrine of *Stone v. Powell* limiting habeas corpus review in the context of the Fourth Amendment should be extended to the Fifth and Sixth Amendments where there was a full and fair hearing of the claims in the State Courts. For the foregoing reasons, the Petition for Writ of Certiorari should be granted and reversal entered and remanded.

Respectfully submitted,

JOSEPH R. GRUNDA
Prosecuting Attorney Lorain County, Ohio
By: ROBERT D. GARY
Assistant Prosecuting Attorney
and
JOHN D. PINCURA, III
General Counsel
226 Middle Avenue
Elyria, Ohio 44035
Attorneys for Petitioner, Arnold R. Jago, Superintendent

APPENDIX A

VERDICT OF THE COURT OF COMMON PLEAS COURT OF LORAIN COUNTY, OHIO

(Dated October 18, 1973)

Presiding: Hon. Paul J. Mikus, *Judge*

No. 16862

COURT OF COMMON PLEAS
Lorain County, Ohio

THE STATE OF OHIO

vs.

TIMOTHY PAPP

Murder in the First Degree; Rape of a Female Under the Age of Twelve; Sodomy

4th Day Trial

VERDICT—GUILTY

Sentenced—Penitentiary

This day again came the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant being again brought into Court in custody of the Sheriff, and being represented by counsel, also came the Jury heretofore impaneled and sworn, and the trial again proceeded. And the said Jury having heard the balance of the testimony, the arguments of counsel and the Charge of the Court, retired to their room in charge of the Bailiff for deliberation. There being no further need for the thirteenth (13th)

and fourteenth (14th) or alternate jurors, they are hereby discharged from all further responsibility in this case. Afterwards came said Jury, conducted into open Court by said Bailiff, with their Verdict in writing, signed by each concurring Juror in the words and figures following, to wit:

Cr. 26

FIRST COUNT

VERDICT—Guilty

Court of Common Pleas, Lorain County, Ohio 13757

'73 OCT 18 PM 5:51

September Term, A. D. 19 73

THE STATE OF OHIO

vs. No. 16962

TIMOTHY PAPP

Indictment for (First Count) Murder in the First Degree (ORC 2901.01)

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant Timothy Papp, Guilty of Murder in the First Degree (ORC 2901.01), in manner and form as he stands charged in the Indictment, in the First Count.

Dated October 18 19 73

1. [signature] 7. [signature]
2. [signature] 8. [signature]
3. [signature] 9. [signature]
4. [signature] 10. [signature]
5. [signature] 11. [signature]
6. [signature] 12. [signature]

I hereby certify [illegible] true and certified [illegible] on file in this [illegible]

[signature] Deputy

. 26 Barrett Brothers, Publishers, Springfield, Ohio

SECOND COUNT

VERDICT--- Guilty

Court of Common Pleas, Lorain County, Ohio

'73 OCT 18 PM 2:1 September Term, A. D. 19 73

THE STATE OF OHIO

vs. No. 16862

TIMOTHY PAPP

Indictment for (Second Count) Murder in the First Degree (ORC 2901.01) (while perpetrating rape)

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant Timothy Papp, Guilty of Murder in the First Degree (ORC 2901.01), in manner and form as he stands charged in the Indictment, in the Second Count.

Dated October 18 19 73

1. Charles W. Crosby
2. Thomas H. Mathis
3. Brent A. Behner
4. Richard C. Culp
5. Leonard Quennepe
6. Thomas J. Yourich
7. Kermit Hogue
8. Kathleen J. Weddecker
9. Eileen T. Hallberg
10. Richard C. Hodgson
11. Marcella Walder
12. Janice Somerville

Ch. 26 Barrett Brothers, Publishers, Springfield, Ohio

157574

THIRD COUNT

VERDICT--- Guilty

Court of Common Pleas, Lorain County, Ohio

'73 OCT 18 PM 3:1 September Term, A. D. 19 73

THE STATE OF OHIO

vs. No. 16862

TIMOTHY PAPP

Indictment for (Third Count) Rape of Female Under Twelve (ORC 2905.02)

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant Timothy Papp, Guilty of Rape of Female Under Twelve (ORC 2905.02), in manner and form as he stands charged in the Indictment, in the Third Count.

Dated October 18 19 73

1. Charles W. Crosby
2. Thomas H. Mathis
3. Brent A. Behner
4. Richard C. Culp
5. Leonard Quennepe
6. Thomas J. Yourich
7. Kermit Hogue
8. Kathleen J. Weddecker
9. Eileen T. Hallberg
10. Richard C. Hodgson
11. Marcella Walder
12. Janice Somerville

And thereupon said Defendant be, and he hereby is, sentenced to be again taken to the Jail of Lorain County, Elyria, Ohio; thence within five (5) days to the Ohio State Penitentiary, there to serve an indeterminate sentence according to law for violation of Murder in the First Degree (O.R.C. 2901.01) in the first count; Murder in the First Degree (O.R.C. 2901.01) on the second count; and Rape of Female Under Twelve (O.R.C. 2905.02) on the third count. Defendant and his counsel being advised of the provisions of Ohio Revised Code Section 2947.25, and being further advised that the punishment of each of the above convictions is life imprisonment which the Court would impose concurrently; Defendant thereupon waived psychiatric examination and report as provided in said section 2947.25. It is the JUDGMENT OF THE LAW AND THE SENTENCE OF THE COURT that the Defendant be sentenced to the Ohio State Penitentiary to serve a sentence of life imprisonment on each of the three counts. All Counts to be served concurrently. Defendant to pay costs of prosecution.

APPENDIX B

OPINION OF THE COURT OF APPEALS OF LORAIN COUNTY, OHIO

(Dated June 12, 1974)

C.A. No. 2180.

IN THE COURT OF APPEALS,
NINTH JUDICIAL DISTRICT.

State of Ohio)
) SS:
Lorain County)

STATE OF OHIO,
Plaintiff-Appellee,

vs.

TIMOTHY PAPP,
Defendant-Appellant.

APPEAL FROM JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS OF LORAIN COUNTY,
CASE No. 16862.

DECISION and JOURNAL ENTRY.

This cause came on to be heard April 15, 1974, upon the record in the trial court, including the Transcript of Proceedings; and the briefs. It was argued by counsel for the parties and submitted to the court. Each assignment of error was reviewed by the court and, upon review, the following disposition made:

HUNSICKER, J.

The defendant (appellant) herein, Timothy Papp, was indicted, tried and convicted for the murder of Roxie Ann Keathley, aged nine years. He was found guilty of (1) murder in the first degree; (2) murder in the commission of rape; and (3) rape. A fourth count of the indictment was dismissed by the court.

The plea which the defendant made to the indictment was not guilty, and not guilty by reason of insanity. The defendant, after commitment to Lima State Hospital, was found to be "presently sane." Trial was had after this report was received.

Counsel for defendant in this appeal says:

"1. The trial court erred in overruling defendant's motion to suppress evidence in that defendant was not advised of his constitutional rights as outlined in Miranda v. Arizona, prior to the interrogation on March 21 and March 23, 1973.

"2. The trial court erred in overruling defendant's motion to suppress evidence in that defendant was denied the right to assistance of counsel on March 23, 1973, and incriminating statements were obtained from defendant after defendant's request for counsel.

"3. The trial court erred in overruling defendant's motion to suppress evidence in that the incriminating statements of defendant were not given voluntarily.

"4. The trial court erred by admitting into evidence the incriminating statements made by defendant and defendant must be granted a new trial.

"5. The trial court erred in allowing the testimony of a witness not included in the list provided

to defendant, pursuant to Ohio Criminal Procedure Rule 16.

"6. The trial court erred in overruling defendant's motion for mistrial when six of the jurors admitted receiving harassing phone calls after their names and addresses were published in the newspaper."

On March 13, 1973, the parents of Roxie Ann Keathley reported her disappearance from home as of March 12, 1973. A witness for the state of Ohio told of seeing Roxie Ann in the presence of a man in a white trench coat like the one worn by Papp. Papp was interrogated, after being given the Miranda warning, and returned to his home after such questioning.

On March 21, 1973, Papp was arrested on a warrant signed by his mother-in-law, and placed in jail, after being convicted of a misdemeanor. While in jail, Papp asked to talk to officer Zieba concerning the wife and child of Papp, who had left home. No Miranda warning was given when the conversation with officer Zieba, and two or three other officers discussed the disappearance of Roxie Ann, and conversation about a trunk that Papp was to have taken to the home of his parents. Some wine was given to Papp at this time because he asked for something to calm his nerves.

On March 23, 1973, at Papp's request, officer Zieba, and the three other officers, talked with Papp. At first, the conversation related to Papp's wife and child. Officer Zieba located Mrs. Papp and told Papp that she would be told she could see Papp Sunday afternoon. No additional Miranda warning was given Papp, and the officers began a several hour conversation with him regarding the Keathley girl. Papp became very excited and was given another small glass of wine. Papp then, in a moment

of great agitation, said that he did not mean to hurt Roxie Ann. After he became calm, the conversation resumed. He was told that if he had no money, an attorney would be appointed when he went to court. He was assured that the Judge would be told of his cooperation. He told the officers where the body of Roxie Ann was located and, when the officers could not find the place, he went with them to the place where the body was found.

Papp was given some medication prescribed by a Doctor Sigalove. The doctor did not come to the jail to see Papp, but relayed the prescription through a call to a pharmacy, after which the officers secured the prescribed medication.

The trunk, in which Papp had carried the body of Roxie Ann, was not located at that time but, on March 26, 1973, Papp asked to talk to the officers. A Miranda warning was given, and Papp drew a map of the location of the trunk, which was then found.

Papp was charged with the crime of murder on Monday, March 26, 1973, and no further conversation was had with him regarding the crime.

During the period beginning with the disappearance of Roxie Ann, the officers met Papp many times and talked with him, and he assisted them in trying to locate the child. Papp was critical of the officers for not finding his wife and, when in jail, he requested to talk about his wife's disappearance, from which conversations there were questions about Roxie Ann. At no time did Papp say that he did not wish to talk to the officers about the girl's disappearance. At these times, he was asked if his parents should be contacted about hiring an attorney, and he said "no" to all such suggestions.

The offer of Papp to help locate the body was a voluntary offer on his part and not the result of threats,

coercion, or other improper conduct by the officers. It was on Monday that Papp was charged with the offense of murder, since the discovery of the body was made on Saturday night. Papp claimed to the officers that on the night of the rape-murder, he had consumed two-fifths of whiskey and had taken some pills.

On March 26, 1973, he was charged with the offense and taken to court. While being brought back to jail, Papp again asked to talk to officer Zieba, who again gave him a Miranda warning. Papp then said that he wanted to talk to the officer and proceeded to implicate the suspect referred to earlier, who, upon investigation, was completely exonerated. It was during this conversation that Papp drew a diagram of the place where the trunk was found, covered with leaves and tree limbs.

It was after the arraignment of March 26th that counsel was appointed for Papp. Counsel then filed a motion to suppress evidence, which was denied. During the trial, defense counsel twice orally moved to suppress all evidence of talks with Papp and the matters resulting from such talks. The trial court overruled these oral motions.

There were two occasions during the conversations when Papp became nervous and excited and a small paper cup of wine was given him; and, on the second such occasion, the jail doctor was called for a prescription, which was obtained and given to Papp by officer Zieba. Earlier, Papp had requested whiskey, but the officers gave him wine. After he drank it, his nervous condition was eased and he acted normal thereafter. He also took the doctor's prescription, a mild tranquilizer, for the nervous condition.

Timothy Papp did not testify in his own defense. We do not know the extent of his education, but we do know that he owned books, and among them some encyclopedias. We conclude that he understood the nature of the Miranda warning such as the first given to him.

It is obvious in this detail of the evidence, that the chief question this court has before it is the admissibility of the evidence received as a result of the interrogations of Papp conducted on March 13, March 21, March 23, and March 26, 1973. Only the interrogation of March 26 occurred after Papp was charged with the offenses herein. A thorough Miranda warning was given Papp on March 13 when he came to the sheriff's office, as requested by the officers who brought him in and took him home. Papp owned no automobile. On March 21 and March 23, he was in jail on a misdemeanor conviction and contacted officer Zieba about an unrelated subject, but continued to discuss thereafter, with the officer, the disappearance of Roxie Ann. At no time did Papp insist on a lawyer or even request that one be obtained for him, although he did say that they should call Mr. Otero (a lawyer), which officers did. He was not available and no request thereafter for a lawyer was renewed.

Counsel for Papp has urged the failure to apply the Miranda warning requirement. He cites, as authority for the proposition that before every conversation with a suspect in a criminal case, the suspect must be given a second or repeated complete Miranda warning, the cases of *Miranda v. Arizona*, 384 U.S. 436, 16 L ed 2d 694, 86 S. Ct. 1602; *Evans v. Swenson*, 332 F. Supp. 360; *U. S. v. Vanterpool*, 394 F. 2d 697; and *U. S. v. Osterburg*, 90 S. Ct. 2216, 423 F. 2d 704. We do not find the cited cases as authority for such claims. There is no doubt that Papp was given a first and complete Miranda warning on March 13, and again a renewal warning on March 26, after being charged with the crime.

Papp at no time said that he killed Roxie Ann, only that he did not mean to hurt her. Papp never said that he raped the child, or strangled her, or molested her in

any way. The evidence against him is largely circumstantial, beginning with the time that Papp, in his white trench coat, was seen walking toward his apartment entrance with Roxie Ann, until the trunk, and body of Roxie Ann, were found at the place where Papp took the officers.

A confession (much less the information given by Papp), is not necessarily invalid because the Miranda warning is not repeated in full each time the interrogation process is resumed after an interruption. *Tucker v. U. S.*, 375 F. 2d 363, at 365-366; and *Miller v. U. S.*, 396 F. 2d 492, at 495-496.

In *Miller v. United States*, 396 F. 2d 492, at 496, the court said:

> "The defendant reads Miranda as requiring that the full warning be given each time the interrogation process is renewed. This is not the first time this contention has been made before this Court. A similar one was made in Tucker v. United States, 375 F. 2d at 365-366. In that case, this Court affirmed the defendant's conviction on a finding that the defendant had been warned of all of his 'Miranda' rights at the outset of the interrogation process. The implicit holding in Tucker was that a confession is not necessarily invalid because the 'Miranda' warning is not repeated in full each time the interrogation process is resumed after an interruption."

In *United States of America v. Kinsey*, 352 F. Supp. 1176, at 1178, the court said:

> "There is no requirement that the Miranda warning be repeated immediately prior to the commencement of every interrogation session. They do not become 'stale.' "

See, also: *Commonwealth v. Abrams*, 278 A. 2d 932.

The Miranda warning must be given at the beginning of interrogation, and nothing is said, in *Miranda v. Arizona, supra,* regarding repetition of such warning at later stages of such interrogation.

There is nothing in the evidence before this court to show that Papp did not understand the nature and purpose of the warning that officer Zieba gave to him on March 13 and March 26. There is nothing in the evidence before us that shows the statements Papp made to the officers were not freely and voluntarily made. There is nothing shown in this evidence that Papp really desired to see a lawyer, even when told that the state would supply counsel if he could not pay for such services.

We reject assignments of error numbers one, two, three and four, on the authority and reasoning set out above.

Objection is made by assignment of error number five that the name of one witness (Mr. Zimmerman, the manager of the apartment where Papp lived), was not given to defense counsel on the list of witnesses for the prosecution requested by counsel for Papp. The name of Mr. Zimmerman does appear on the sheriff's record of witnesses kept by that office. The nature of his testimony was not such as to incriminate Papp. Zimmerman's testimony concerned a description of the premises, which premises certainly the defense must have examined before trial.

The Rules of Civil Procedure are to be construed and applied "to effect just results by eliminating delay, unnecessary expenses and all other impediments to the expeditious administration of justice." Rule 1(B). To reverse the judgment and remand the cause for rehearing, based on assigned error number five, would not effect just results, eliminate delay, or prevent unnecessary expense.

The case of *United States v. Kelly,* 420 F. 2d 26, does not apply in this instance. We reject assigned error number five.

In consideration of assigned error number six, the record shows that the jurors, on oath, said they could well and truly try the case, notwithstanding some telephone calls and such statement was accepted by the trial Judge. We find no error in the conduct of the trial Judge in that respect.

We have examined all claims of error and find none prejudicial to the substantial rights of the appellant, Timothy Papp. The judgment is affirmed.

Judgment affirmed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Exceptions.

/s/ MYRON T. BRENNEMAN (sgd)
Presiding Judge for the Court.

BRENNEMAN, *P.J.*, and VICTOR, *J.*, concur.

(HUNSICKER, *J.*, retired and assigned to active duty under authority of Section 6.(C), Article IV, Constitution.)

APPENDIX C

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION FOR LEAVE TO APPEAL

(Dated November 22, 1974)

No. 74-778

THE SUPREME COURT OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

vs.

TIMOTHY PAPP,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR LORAIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX D

JUDGMENT AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Judgment Filed February 26, 1976;
Opinion Filed February 19, 1976)

No. C 1 75-301

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY PAPP,
Petitioner,

v.

ARNOLD R. JAGO, SUPT.,
Respondent.

JUDGMENT

This action came before the Court, Honorable Timothy Hogan, United States District Judge, presiding, upon petitioner's application for writ of habeas corpus and respondent's return of writ, including exhibits submitted therewith. Upon consideration, and for the reasons set forth in the memorandum opinion of the Court of February 19, 1976, the court concludes that petitioner's constitutional rights were violated by the introduction at trial of evidence

obtained on March 23, 1973 in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Accordingly, it is Ordered and Adjudged that the petition for writ of habeas corpus is meritorious, and that the writ shall issue if within a reasonable period of time petitioner is not retried by the State of Ohio without the evidence obtained by the March 23, 1973 interrogation.

IT IS SO ORDERED

/s/ TIMOTHY MORGAN
United States District Judge

No. C-1-75-301

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY PAPP,
Petitioner,

vs.

ARNOLD R. JAGO, SUPT.,
Respondent.

MEMO

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. Petitioner, Timothy Papp (in support of his petition) alleges that he was not advised of his Fifth and Sixth Amendment rights prior to making incriminating statements; and that during his custodial interrogation he asked for an attorney on two occasions, such requests being denied. Further, petitioner alleges that his incriminating statements were generally involuntary.

On October 18, 1973, following a trial by jury, Papp was found guilty of first degree murder, murder in the perpetration of a rape, and rape. Papp was thereafter sentenced to life imprisonment and is presently confined at the Southern Ohio Correctional Facility in Lucasville, Ohio.

The above convictions were affirmed by the Court of Appeals for the Ninth Judicial District of Ohio and the Ohio Supreme Court. The claims raised here by the petitioner were also raised on appeal in the state courts. Therefore, petitioner has exhausted his state remedies. The

matter is now before the Court on the petition for writ of habeas corpus, respondent's return, the transcript of the hearing on the motion to suppress, and the trial transcript.

FACTS

On March 12, 1973, Roxie Ann Keathley, age nine, disappeared while collecting pop bottles in her neighborhood in Lorain, Ohio (Tr. 83-89). Petitioner resided in the same neighborhood and was seen with Roxie Ann shortly before her disappearance. On March 13, 1973, in connection with their investigation of the disappearance of the little girl, the police transported the petitioner to the Lorain County Sheriff's Office around 11:30 P.M. (Tr. 337). There, petitioner was questioned by Detective Zieba, in the presence of Detectives Mahoney and Penrod. Prior to the questioning, petitioner was advised of his constitutional rights as required by the Supreme Court in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966) (Tr. 338). At that time, Detective Zieba questioned petitioner about a trunk. Petitioner stated that he transported the trunk to his mother's on the morning of March 13, 1973, but when his mother would not answer the door, he brought the trunk behind a grocery store nearby.[1] Petitioner denied any knowledge of the whereabouts of Roxie Ann Keathley and at 1:00 A.M. the questioning ceased; the petitioner was brought home (Tr. 338-342; 362-365).

Between the dates of March 13, 1973 and March 21, 1973, Detective Zieba had several more conversations with petitioner relative to the missing girl. At no time during this period did petitioner indicate any knowledge of her whereabouts (Tr. 342, motion Tr. 60).

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1. At the conclusion of the interrogation, Papp took the detectives to the rear of the grocery store, but there was no trunk found there.

On March 21, 1973, petitioner was arrested pursuant to a complaint charging him with making harassing phone calls. He was then taken to the Lorain County Jail. Late that same afternoon (March 21, 1973), petitioner requested to speak with Detective Zieba regarding the location of his wife and child (Motion Tr. 60). Present during this conversation were the petitioner, Detectives Zieba, Mahoney, Bulger, and Penrod (Tr. 366). The conversation lasted from approximately 4:30 P.M. to 9:00 P.M. No *Miranda* warnings were given, and the bulk of the conversation centered on the disappearance of Roxie Ann Keathley. Again, petitioner expressed no knowledge concerning the disappearance of the girl (Tr. 367-371).

On March 23, 1973, at approximately six o'clock in the evening, petitioner again requested to talk to Detective Zieba concerning his wife and child. Again no warnings were given and Detective Zieba eventually shifted the conversation to the disappearance of Roxie Ann (Tr. 372). Detectives Mahoney, Penrod, and Bulger were present in the room with the petitioner and Detective Zieba.

On two occasions, petitioner asked for an attorney but one was not provided nor did questioning cease. At approximately 8:00 P.M., petitioner "broke down, went berserk, slammed his fists down on one of [the] folding chairs, tried to hit the tape recorder and hit his head against the wall and [claimed] he was going to kill somebody; [he] had to be handcuffed] and he really went into hysterics" (Tr. 345). Also, while in a hysterical state, the petitioner yelled, "man, I am sorry, I didn't mean to hurt the little girl" (Tr. 347). At that time, petitioner was given a small cup of wine to calm down and indeed he did calm down.[2]

---

2. On March 23, 1973, petitioner was taking medication for an ulcer and also had taken some aspirin. Doctor Sigalove testified that in his opinion a small amount of alcohol coupled with a small amount of valium (a mild tranquilizer) would produce no adverse effect (Tr. 418-419).

Subsequently, during the conversation, petitioner said that the girl would not be in the trunk, but that he would take them to the trunk and also to the child's body. The detectives, instead, requested petitioner to draw them a map showing where the body was. When the detectives went out, they failed to find the body. Therefore, they returned, asked the petitioner if he would mind accompanying them, and he showed them to the body.

On March 26, 1973, petitioner was formally charged with the murder and rape of Roxie Ann Keathley. After his first court appearance, petitioner engaged in another conversation with Detective Zieba. This time the *Miranda* warnings were given to petitioner. Petitioner continued to deny any knowledge of the death of the girl, and attempted to implicate one Jose Mendiola. Also, petitioner drew a diagram showing the location of the trunk, which was later discovered.

During the trial, experts testifying on behalf of the state stated that blood and hair samples found in the trunk matched the blood and hair of the girl (Tr. 312-322). Also witnesses testified that petitioner was seen with the girl shortly before she disappeared.

First, the state claims that *Miranda* warnings are only necessary when police initiate questioning, and since petitioner admittedly initiated the conversations on March 21 and March 23, 1973, no warnings were necessary. We disagree. It is undisputed on the record that petitioner initiated conversations *concerning the location of his wife and child.* (emphasis added.) The police then caused the conversation to shift to the disappearance of Roxie Ann Keathley. There is no showing by the state on the record that the petitioner ever wished to initiate a conversation about the disappearance of Roxie Ann. When the conversation shifted, the warnings should have been given, under the spirit, if not the letter, of *Miranda.*

Related to this argument, the state contends that the verbal exchanges did not amount to "interrogation," but rather were "conversations." This is an exercise in semantics. It is clear from the record that the petitioner was questioned for prolonged periods in the presence of three and sometimes four, detectives. This was precisely the type of interrogation described and criticized in *Miranda.* See also *Williams v. Brewer,* 509 F.2d 227, 233 (8th Cir. 1975), *app. pending* ____ U.S. ____, where "casual conversations" which produced incriminating statements in the absence of warnings were held to be contrary to constitutional requirements.

The Ohio Court of Appeals held that the *Miranda* warnings were not necessary on March 23, 1973 because they had been given once on March 13, 1973, citing *Tucker v. United States,* 375 F.2d 363 (8th Cir. 1967) and *Miller v. United States,* 396 F.2d 492 (8th Cir. 1968). It is true that the *Miranda* warnings do not become stale and there is no need to repeat them at the initiation of each new interrogation. See *United States v. Kinsay,* 352 F. Supp. 1176 (E.D. Pa. 1972); *Moore v. Hopper,* 387 F. Supp. 931 (M.D. Ga. 1974). Nevertheless, in most instances, this Court would question whether a defendant was aware of his rights ten days after he had been given the warnings. There is no per se rule, and, in each case, the Court must determine whether the defendant fully understood his rights. See *Hill v. Whealon,* 440 F.2d 629 (6th Cir. 1974). In this case, it appears that the petitioner was aware of his rights on March 23, 1973. At least, he was

---

3. Petitioner has not filed any memorandum of law in this action. His only filing is the petition for writ of habeas corpus. Therefore, this Court has had to note the issues by means of its own examination of the record.

sufficiently aware of his rights to request an attorney and to have one present during interrogation. Therefore, as to the first claim, it is held that the petitioner was aware of his rights on March 23, and was not prejudiced by the lack of *Miranda* warnings on that date.

II

For his second claim, petitioner states that he requested the assistance of a lawyer twice during the interrogation of March 23, 1973, and at no time during the interrogation was he provided with one. The State of Ohio responds by arguing that (1) the petitioner initiated the conversation, and (2) that after his request, he changed his mind and voluntarily continued the conversation. Neither of the state's arguments in this regard is persuasive. The Supreme Court in *Miranda* spoke in unequivocal terms:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

It was admitted by Detective Zieba, on cross-examination, that after each request by petitioner for an attorney, the conversation continued on (Tr. 383-384).

> Q. And wasn't it during this period that on two occasions he asked for an attorney and he didn't get one on these occasions?
>
> A. (Lt. Zieba) On these occasions, he asked for an attorney and I advised him of what I could do for him.
>
> Q. And you continued your interrogation?
>
> A. Yes that is correct.

• • •

> Q. Now, on these occasions when he asked for an attorney, isn't it true that he remained silent for some periods of time?
>
> A. Yes. He would remain silent for a minute or two, probably.
>
> Q. And during this period, you would be talking and asking questions?
>
> A. I would be talking to him and inquiring on which attorney, or how we could reach him, yes.
>
> Q. Didn't, on the second request for an attorney, didn't he then remain silent and you continued to interrogate him about the girl at that time?
>
> A. No ....
>
> Q. Was there an interrogation about the trunk and its location?
>
> A. I recall that it could have been, yes. We could have been talking about the trunk, yes.
>
> Q. Wasn't it you that continued the interrogation while he remained silent?
>
> A. I continued, yes.

As stated above, the state contends that the petitioner changed his mind about an attorney and voluntarily continued the conversation. The Court in *Miranda* addressed this question as follows:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel

• • •

> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given . . .
>
> > Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.
> >
> > *Carnley v. Cochran*, 364 U.S. 506, 516 (1962); *Miranda v. Arizona*, 384 U.S. at 475.

There is nothing in this record to indicate that the petitioner affirmatively changed his mind about wanting an attorney. Therefore, we hold that there was no waiver of the assistance of counsel during the interrogation and petitioner's Sixth Amendment right was violated.

III

Finally, petitioner contends that, under the totality of the circumstances, any incriminating statements made by him during his interrogation were not voluntary. Specifically, petitioner contends that certain statements were made while under the influence of alcohol, or drugs, or both. After a thorough examination of the record, we find no merit to this claim. The evidence is uncontradicted that petitioner was given only a small amount of wine, and had taken a mild tranquilizer (Tr. 375, 376). Dr. Sigalove, who prescribed the medication, stated that the combination of the drug and alcohol, to such a small extent would have no adverse effect on the petitioner (Tr. 422).

However, there is other evidence which would tend to show that the incriminating statements were involuntary. On March 21, 1973 and March 23, 1973, the law enforcement officers questioned petitioner for a combined total of at least seven hours (Tr. 343, 345, 374). There was no attorney present during questioning (Tr. 383). Petitioner had been kept in isolation for three days (Tr. 379-380); and finally on March 23, 1973 became "hysterical, went berserk" and blurted out ". . . I didn't mean to hurt her." He then drew a diagram to indicate the location of the girl's body.

In *Hill v. Whealon*, 490 F.2d 629 (6th Cir. 1974), the Court cited with approval and quoted the following passage:

> It is neither necessary nor desirable to undertake to fashion a per se rule to be applied in all cases presenting the *Miranda* issue. The crucial question always must be: has the prosecution sustained its heavy burden of demonstrating that the defendant was effectively advised of his rights, and did he knowingly and understandingly decline to exercise them? *Hughes v. Swenson*, 452 F.2d 866, 868 (8th Cir. 1971).

The above question must be answered in the negative in this case. The "heavy burden" placed upon the prosecution to show that a suspect waived his rights or waived the right to the presence of an attorney has not been met. It was in applying the above standard that the Ohio Court of Appeals committed error. In its opinion affirming the conviction, the Ohio Court of Appeals stated the following:

> There is nothing in the evidence before this Court to show that Papp did not understand the nature and purpose of the warning that officer Zieba gave to him on March 13 and March 26. There is nothing

> in the evidence before us that shows the statements Papp made to the officers were not freely and voluntarily made. There is nothing shown in this evidence that Papp really desired to see a lawyer, even when told that the state would supply counsel if he could not pay for such services.

The above paragraph implies that the defendant had the burden of proving involuntariness. That is incorrect. *Miranda* specifically states that "a heavy burden rests on the government to demonstrate [waiver] . . . . A valid waiver will not be presumed simply from the silence of the accused . . . ."

Therefore, we hold that the respondent has not met his heavy burden of establishing that the petitioner freely and voluntarily waived his Fifth Amendment rights and his Sixth Amendment right to counsel during interrogation, and considering the totality of the circumstances, the statements made by petitioner on March 23, 1973 were involuntary.

It remains to be determined whether the statements made by the petitioner in the absence of warnings were incriminating and/or prejudicial. The Ohio Court of Appeals, in its opinion affirming the conviction, seemed to imply that petitioner never actually "confessed" to the crime, but rather gave "information." This distinction is not supported by *Miranda*. The *Miranda* case was concerned not only with the police obtaining confessions that were involuntary but also "any incriminating statement."

The Court in *Miranda* stated:

> No distinction can be drawn between statements which are direct confessions and statements which amount to "admission" of part or all of an offense. The privilege against self-incrimination protects the individual

> from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory."

Therefore, the spontaneous exclamation "I didn't mean to hurt her" while not precisely a confession, was indeed an incriminating statement. Also, the statement of the petitioner that he would lead police to the body, though not an admission that he in fact killed the girl, was clearly incriminating. Likewise, the map of the location where the girl might be found was incriminating.

IV

Incriminating statements were also made on March 26, 1973. Detective Zieba testified that upon his return from Lorain Municipal Court, petitioner initiated another conversation concerning the disappearance of Roxie Ann Keathley (Tr. 353). At that time, Detective Zieba again read the petitioner his rights. Although petitioner denied any involvement in the death of the girl, he did draw a diagram showing the location of the missing trunk. He also attempted to implicate an acquaintance, Jose Mendiola (Tr. 354-358). The issue here is whether the incriminating statements given March 26, 1973 are inadmissible because of the state's failure to have an attorney present, as requested on March 23, 1973. For the reasons stated below, it is held that the statements and other evidence obtained on March 26, 1973 are admissible.

First, it is clear that on March 26, 1973, the petitioner initiated the conversation concerning the disappearance of the girl. This is unlike previous occasions wherein the petitioner initiated conversations concerning an unrelated subject (i.e., his wife and child), but was steered

into a conversation concerning the disappearance of the girl. Nothing in the record suggests any police coercion on March 26, 1973.

Second, petitioner was fully advised of his rights before talking. *Miranda* did not provide that all incriminating statements were inadmissible. "After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.[4] 384 U.S. at 479.

Therefore, having held that the statements made on March 26, 1973 were admissible, it follows that any evidence obtained as a result of such statements is likewise admissible. That would include the trunk and its contents.

CONCLUSION

The Court, having found that the petitioner's constitutional rights were violated during his pre-trial confinement prior to his state court conviction, shall issue the writ, unless the petitioner is retried within a reasonable time without the introduction of any evidence obtained by means of the March 23, 1973 interrogation. That includes all incriminating statements made, as well as evidence of the death of the girl and evidence of the physical condition of the body.[5] An appropriate judgment may be presented.

IT IS SO ORDERED.

/s/ TIMOTHY S. HOGAN
United States District Judge

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4. For the most recent case interpreting the scope of *Miranda*, see *Michigan v. Mosley*, ... U.S. ..... (1975).

5. This latter evidence is excluded as "fruits of the poisonous tree." See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Alderman v. United States*, 394 U.S. 165 (1969).

APPENDIX E

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 8, 1977)

No. 76-1402

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY PAPP,
Petitioner-Appellee,

v.

ARNOLD R. JAGO,
Respondent-Appellant.

ORDER

Before: PECK, LIVELY and ENGEL, *Circuit Judges*

This matter is before the court upon the appeal of the respondent from a district court order and judgment granting the petitioner's writ of habeas corpus unless the petitioner is retried within a reasonable time but without the introduction of evidence which the court found was unlawfully obtained by means of an interrogation of the petitioner on March 23, 1973.

Upon oral argument before this court, counsel for the respondent argued that the district court did not have the benefit of the tape recordings of the interrogations of the petitioner, although it read the transcript thereof. While this appears to have been through the neglect of

the respondent and without fault on the part of the district court, it was urged that the adequacy of the district court's review was impaired by its inability to consider the actual tape recordings of the police interrogations which had been considered by and were a part of the record in the state court.

Because of the unique importance of the issues involved in these proceedings and from an abundance of caution,

IT IS ORDERED that the case is remanded to the district court for the limited purpose of affording the respondent the opportunity, within such reasonable time as that court shall direct, to supplement the record by the addition of any tape or voice recordings relevant to the confessions and statements of the petitioner under challenge in this appeal, and for the purpose of allowing the district court an opportunity to review the same. Within a reasonable time thereafter, the district court shall transmit any such recordings and other appropriate record to this court together with a certification as to whether, in its opinion, any grounds exist for the reconsideration by it of the opinion and judgment heretofore entered. Remand herein is without surrender of jurisdiction over this appeal, which is retained.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX F

MEMORANDUM AND CERTIFICATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed May 6, 1977)

No. C-1-75-301

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY PAPP,
Petitioner,

v.

ARNOLD JAGO, SUPERINTENDENT,
Respondent.

On remand from

No. 76-1402

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY PAPP,
Petitioner-Appellee,

v.

ARNOLD JAGO, SUPERINTENDENT,
Respondent-Appellant.

MEMO AND CERTIFICATION

On March 8, 1977, this cause was remanded for limited purposes described in the remand order and with instructions—the Court of Appeals retained jurisdiction.

Pursuant to the order, this Court, on March 30 and 31, 1977, on notice and with counsel for each side present, supplemented the record as directed.

Six (6) tapes were played in open court. The tapes are identified as Hearing Exhibits 1 through 6. The tapes constitute all the recordings which are claimed relevant by either side, and cover the interrogations of March 13, 21, 23, and 26, 1973.

The tapes have previously been transmitted to the Clerk of the Court of Appeals along with a recorder which is calibrated to some extent to the tapes.

A transcript of the hearings (proceedings) of March 30 and 31, 1977 has been filed in this cause and is forwarded herewith as a supplement to the record. The tapes are not transcribed. The staff of this Court does not possess the facilities necessary for that. The State was offered the opportunity to secure such expert transcription and, evidently, all concerned are in agreement that such be not necessary. The tapes are *substantially* understandable on hearing when played by the "recorder player." In addition, each side, as each tape was played, was permitted to comment on and describe the important parts of the tape as played. Those comments and findings by the Court in the crucial areas are contained in the transcript.

There is no doubt that Papp on at least two occasions during the March 23 interrogation asked for the services of a lawyer and on the first occasion stated point-blank that he did not want to talk to the police any further. On neither occasion did the interrogation cease. Counsel was not provided. The "admission" followed the first request for a lawyer—the map and disclosure of the location of the body followed both requests and also followed multiple ministrations of wine, long and repetitive interrogation, strain, loss of composure, and breakdown.

There is nothing to indicate any waiver of the right to terminate the interrogation or a waiver of the right to counsel except the fact that the defendant subsequently disclosed. That is not enough. The State has simply produced nothing on which to base a waiver of the constitutional rights, once asserted.

This Court does hereby

CERTIFY

that, in its opinion, no grounds based on the tapes exist for the reconsideration of the opinion and judgment heretofore entered.

The intervening decision and opinion in *Brewer v. Williams* ..... U.S. ..... (1977) involved a number of facts comparable to those in this case and it is believed that generally the previous disposition by this Court is consistent with the *Brewer* opinion. We do not believe that, under the terms of the remand, this Court has jurisdiction to now limit the exclusion on retrial to the items set forth in footnote 12 on page 18 (slip opinion) in the *Brewer* case (leaving for the State Court the questions whether where the body was found and its condition might be admissible). If this Court had jurisdiction so to do, it would.

/s/ TIMOTHY S. HOGAN
United States District Judge

TO THE CLERK—

Please transmit this Certification and the Transcript of the March, 1977 hearings and an up-to-date docket sheet to the Clerk, United States Court of Appeals for the Sixth Circuit.

/s/ TIMOTHY S. HOGAN

APPENDIX G

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 14, 1977)

No. 76-1402

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY PAPP,
Petitioner-Appellee,

v.

ARNOLD R. JAGO, Superintendent,
Respondent-Appellant.

ORDER

Before: PECK, LIVELY and ENGEL, *Circuit Judges*

This is an appeal from an order of the district court granting petitioner's writ of habeas corpus unless petitioner is retried within a reasonable time without the introduction of evidence which the court found was unlawfully obtained by means of an interrogation of the petitioner on March 23, 1973. On March 8, 1977, this court remanded the instant case to the district court to supplement the record with tape recordings of the interrogations of petitioner and to certify to this court whether any grounds exist for the district court's reconsideration of its opinion. Pursuant to our order, the district court on May 6, 1977 supplemented the record and certified that the tape recordings did not alter its prior opinion that petitioner had not

waived his constitutional rights during the March 23 interrogation.

In his certification the district judge properly concluded that in view of the limited nature of our remand, he was without jurisdiction to amend his previous judgment to conform with the intervening decision of the United States Supreme Court in *Brewer v. Williams,* ____ U.S. ____ (1977), 45 U.S.L.W. 4287. He, however, noted that had he the power to do so, he would amend the judgment in the light of footnote 12 of *Brewer v. Williams, supra,* 45 U.S.L.W. at 4292-93. We agree.

Upon consideration, we affirm the determination of the district court that the March 23 interrogation of petitioner Papp violated his constitutional rights as set forth in the opinion of the district court filed therein on February 19, 1976.

Accordingly, this cause is remanded to the district court for modification of the judgment therein rendered so as to grant the petitioner's petition for application for writ of habeas corpus unless he is retried by the state within a reasonable time thereof without the introduction into evidence in any future trial of statements or confessions of the petitioner unconstitutionally obtained during the March 23, 1973 interrogation, the determination of what other evidence must also be excluded as "fruit of the poisonous tree", being a matter for determination in the first instance by the state courts of Ohio.

As so modified, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX H

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT STAYING MANDATE

(Filed July 11, 1977)

No. 76-1402

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY PAPP,
Petitioner-Appellee,

VS.

ARNOLD R. JAGO, SUPERINTENDENT,
Respondent-Appellant.

BEFORE: PECK, LIVELY and ENGEL, *Circuit Judges.*

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition

is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

John P. Hehman, Clerk/ by

/s/ GRACE KELLER
Deputy Clerk

Supreme Court of the United States

October Term, 1977

No. 77-258

ARNOLD R. JAGO, Superintendent,
Petitioner,

vs.

TIMOTHY PAPP,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Respondent intimates that the decision of this Court in *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976) relegated the protections guaranteed under the Fourth Amendment of the Constitution of the United States to a position subordinate to those rights guaranteed by the Fifth and Sixth Amendments. Respondent then urges the Court not to dilute the protections afforded by the Constitution by extending the rationale of *Stone v. Powell, supra* to what he terms "core" Fifth and Sixth Amendment rights.

Respondent's argument that *Stone v. Powell, supra* not be extended to Fifth and Sixth Amendment claims is based upon the assumption that such a decision would impair the constitutional vitality of these amendments.

As this Court noted in *Stone v. Powell, supra* at 482, the exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment. The primary purpose of the rule was to act as a deterrent to law enforcement officials. It was clearly stated in *Stone v. Powell, supra* at 493 that the Supreme Court adheres to the view that the exclusionary rule should be implemented at trial and on direct appeal of State Court convictions. See also, *Stocker v. Hutto,* 547 F.2d 437 at 438 (8th Cir., 1977). The decision in *Stone v. Powell, supra* represents a recognition that there is little, if any, additional deterrent effect in allowing Fourth Amendment claims to be reviewed on collateral appeal and that the additional deterrent effect "if any" does not justify such collateral federal habeas corpus review in Fourth Amendment questions. Once the Court has reached the conclusion that there is no additional deterrent effect in allowing collateral review, there can be little justification for the costs to the criminal justice system of permitting collateral review in a Fifth and Sixth Amendment claim. It is not a constitutional right which is being denied, but rather it is the discontinuation of a procedural protection of questionable effectiveness. In *Bounds v. Smith,* 97 S. Ct. 1491 at 1502 (1977), this Court recognized that there is no broad federal constitutional right to collateral attack and whatever right exists is solely a creation of statute.

Nor could it be argued that the State Courts would be more diligent in their efforts to enforce the exclusionary rule in a Fourth Amendment context as opposed to a Fifth and Sixth Amendment context. In *Richardson v. Stone,* 421 F. Supp. 577 at 579 (N.D. California, 1976), the doctrine of *Stone v. Powell, supra* was extended to a *Miranda* claim based in part upon the fairness and competence of the State Trial and Appellate Courts.

Petitioner sees this Court's decision in *Stone v. Powell, supra* not as a dilution of the Constitution, but as a recognition of the lack of deterrence which would result from federal collateral review, and as an affirmation by the Supreme Court of the ability and willingness of the State Trial and Appellate Courts to exercise their obligation to uphold the Constitution, *Stone v. Powell, supra* at 493 n.35. This view was reinforced in *Swain v. Pressley,* 97 S. Ct. 1224 at 1231 (1977) which recognized that elected judges of the State Courts are fully competent to decide federal constitutional issues. As noted in *Munson v. Gilliam,* 543 F.2d 48 at 54 (8th Cir. 1976), the "State Courts are presumed able to protect federal rights and should be afforded the opportunity to do so. . . ." This competence surely extends to the Fifth and Sixth Amendments as well as the Fourth Amendment.

The Respondent also asserts that the State failed to provide him with a full and fair hearing. The interpretation of what constitutes a full and fair hearing ranges from the position that the Supreme Court in *Stone v. Powell, supra* did not provide any standards and left this question open for future development on a case by case basis, *Pulver v. Cunningham,* 419 F. Supp. 1221 (S.D. N.Y., 1976), to the position that *Stone v. Powell, supra* does not require the reviewing court to do more than take cognizance of the constitutional claim and render a decision in light thereof, *Moore v. Cowen,* 21 Cr. L. 2544 at 2545 (6th Cir. 1977). The Respondent plunges boldly into this fog and asserts with confidence that Respondent was denied a full and fair hearing. A review of the cases to date will demonstrate that his position is essentially without judicial support. The Respondent states that the Ohio Court of Appeals erred in holding that the State had met its heavy burden of showing a waiver of Respondent's rights. In

United States ex rel. Conroy v. Bombard, 426 F. Supp. 97 at 109, 110 (S.D. N.Y., 1976), the Court held that maintaining the lower Courts conclusion to be incorrect is not a proper objective in the context of what is a full and fair hearing. Rather the Court suggests that it is the "process" i.e. whether his claims were presented and whether the conduct of the hearing judge circumvented these procedures are what must be attacked to demonstrate the lack of a full and fair hearing, *United States ex rel. Conroy v. Bombard, supra.* In *Holmberg v. Parralt,* 548 F.2d 745 at 746 (8th Cir. 1977), it was held that the erroneous application of Fourth Amendment principles is not relevant as to whether the Federal Court may review the merit of the claim.

In the instant case, there was a full suppression hearing (See Supplemental Appendix A at SA1), a full review by the State Appellate Court (See Appendix B at A7), and an appeal was made to the State Supreme Court (See Appendix C at A16). There was ample opportunity for the Respondent to raise his constitutional claims. As the Eighth Circuit Court of Appeals noted in *Hines v. Auger,* 550 F.2d 1094 at 1097 (8th Cir. 1977), "The emphasis of *Stone* is on the *opportunity* for full and fair litigation, not upon the fullness or fairness of the litigation." Even had the Respondent not raised his constitutional claim on appeal, it has been held the mere opportunity to do so would be sufficient to establish a full and fair hearing under *Stone v. Powell, supra,* see *Tisnado v. United States,* 547 F.2d 452 at 455 (9th Cir. 1976), nor is there a requirement that there be a Petition for Certiorari to the State Supreme Court to assure a full and fair hearing, *Holmberg v. Parratt, supra* at 747.

Respondent contends that the Petitioner's Statement of facts are . . . "in clear contradiction of what is revealed

by the tapes" (Respondent's Brief, at 15), and that Respondent has . . . "demonstrated that the facts are in dispute . . ." (Respondent's Brief at 18). Counsel for respondent cites his own conclusion offered to the District Court as fact. He states "The context clearly indicates he was *not* referring to a rape-murder" (R.T., page 71; Respondent's Brief, page 5). Respondent then accuses the State of "clear contradiction" when the State refuses to accept Respondent's conclusions as fact. The transcript of the suppression hearing, as well as the record before the State Court of Appeals, demonstrates that the facts were fully aired and the State Court's decisions were based upon the facts. Even in cases where the State decision was not supported by the record, the Federal Courts have been reluctant to find that there was not a full and fair hearing, see *Dents v. Commissioner of Correctional Services,* 421 F. Supp. 557 at 559 (S.D. N.Y., 1976). In the instant case, the record could not have been more complete including actual tape recordings of the questioned interrogation. In so far as the issue of a *Stone v. Powell, supra* full and fair hearing, the question is whether a true statement of the facts was before the State Court when they rendered their decisions. The fact that in the Petitioner's and Respondent's briefs, the State's interpretation of the facts as an advocate of the State is different from the Respondent's interpretation of the facts as an advocate for the Respondent is of no significance if, in fact, it is undisputed that a full record was before the State Courts.

It would appear that under the bulk of decisions to date interpreting *Stone v. Powell, supra* that the Respondent, having had the opportunity of a full review by two tiers of the State system and the submission of this question to the State Supreme Court has not been denied a full and fair hearing, see *Chavez v. Rodriguez,* 540

F.2d 500 at 502 (10th Cir., 1976); *George v. Blockwell,* 537 F.2d 833 at 834 (5th Cir. 1976); *United States ex rel. Placek v. State of Illinois,* 546 F.2d 1298 at 1300 (7th Cir. 1976); *Riguba v. Parkinson,* 545 F.2d 56 at 57 (8th Cir., 1976).

CONCLUSION

Petitioner urges that this case is a highly appropriate vehicle for determining the important question raised in the Writ of Certiorari. This Court, having rendered its decision in *Stone v. Powell, supra,* has placed upon the State Court the burden of responsibility in upholding our constitution in Fourth Amendment situations. Now to suggest that State Courts, although equal to the task of deciding Fourth Amendment issues, are unable to fairly determine Fifth and Sixth Amendment issues without the opportunity for federal review would denigrate the Fourth Amendment to an inferior status. Such a decision would also be a contradiction of the trust placed in the state judiciary by the Supreme Court, which has in *Stone v. Powell, supra,* recognized the capability and integrity of our State Courts and perhaps more significantly provided a cornerstone to all State Courts for increased self-reliance and responsibility for preserving our Constitution.

Although the State Courts have clearly been given increased responsibility in so far as upholding the Constitution, little guidance has been offered as to what is in fact an opportunity for a "full and fair hearing." To date a plethora of lower Federal Court decisions have not arrived at clear-cut guidelines to aid the State Courts in resolving this question. Such guidelines are not only desirable, but necessary in order for this Court to assure the uniform application of criminal justice across the land.

The Respondent has raised many constitutional claims regarding his conviction for the murder of Roxie Ann Keathley. It is not disputed that these issues were presented for the State Court for its determination.[1] This case, with its important constitutional issues presents the ideal vehicle for determining what is, in fact, an opportunity for a full and fair hearing and for developing touchstones for the State Courts and the Federal Courts in determining if an opportunity was presented for a full and fair hearing.

The Petitioner would further urge that the Petitioner's Petition for Writ of Certiorari be granted and an order entered in accordance with Petitioner's Writ of Certiorari.

Respectfully submitted,

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[1] The question of the innocence of the Respondent is not truly before the Court as the Honorable Timothy S. Hogan noted "I don't think anybody has the slightest doubt that this fellow killed her, but that's not the question this Court has." (Remand Hearing Transcript, United States District Court For the Southern District of Ohio, Western Division, Tr. 76).

SUPPLEMENTAL APPENDIX A

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 15, 1973)

Case No. 16862

COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

STATE OF OHIO
Plaintiff

vs.

TIMOTHY PAPP
Defendant

Motion of defendant, Timothy Papp, to suppress any statements made by said defendant to the Lorain County Sheriff's Department on March 23, 1973, and to suppress any evidence obtained thereafter heard, considered and overruled. Exceptions. The court finds that said statements and evidence are admissible under *Miranda v. Arizona,* 386 U.S. 436, and *State vs. Jones,* 35 O.A.2d, 92, and the totality of said investigation and interrogation. The court further finds that the defendant's right to counsel provided for in O.R.C. 2935.20 has not been violated and that such right to counsel have been waived and such statements and evidence obtained without counsel were voluntarily given and are admissible for the consideration of the jury pursuant to further instruction of the court.

/s/ PAUL J. MIKUS
Judge